Santa Cruz Seaside Company, Inc. d/b/a Cocoanut Grove and Wellington's Restaurant *and* Hotel Employees and Restaurant Employees International Union, Local No. 483, AFL–CIO. Case 32–CA–6077

30 April 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

Upon a charge filed by the Union 21 November 1983, the General Counsel of the National Labor Relations Board issued a complaint 15 December 1983 against the Company, the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint alleges that on 25 October 1983, following a Board election in Case 32–RC–1806, the Union was certified as the exclusive collective-bargaining representative of the Company's employees in the unit found appropriate. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g), amended Sept. 9, 1981, 46 Fed.Reg. 45922 (1981); *Frontier Hotel*, 265 NLRB 343 (1982).) The complaint further alleges that since 9 November 1983 the Company has refused to bargain with the Union. On 22 December 1983 the Company filed its answer admitting in part and denying in part the allegations in the complaint.

On 23 January 1984 the General Counsel filed a Motion for Summary Judgment. On 26 January 1984 the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Company filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer to the complaint and its response in opposition to the Motion for Summary Judgment, the Company admits that the Union has requested and it has refused to bargain, but contends that the Union's certification is invalid because the unit certified is inappropriate for the purposes of collective bargaining, and because of the objections to the election and the failure to hold a hearing on "independent investigation"[1] on those objections.[2] The General Counsel argues that all material issues have been previously considered and that there are no litigable issues of fact requiring a hearing. We agree with the General Counsel.

Our review of the record herein, including the record in Case 32–RC–1806, establishes that 7 April 1983 the Union filed a representation petition under Section 9(c) of the National Labor Relations Act. On 28 July 1983, after a hearing, the Regional Director issued a Decision and Direction of Election which provided that an election be conducted in the following unit, which he found appropriate:

> All full-time and regular part-time employees employed by the Company at its Wellington's Restaurant and Cocoanut Grove facilities, including facility services workers; excluding cashiers, musicians, entertainers, restroom matrons, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.

On 9 August 1983 the Company timely filed with the Board a request for review of the Regional Director's determination that the unit is appropriate. The election was conducted as scheduled 28 August 1983 and the ballots were impounded, pending the Board's decision on the Company's request for review.

On 1 September 1983 the Board, by mailgram, denied the Company's request for review.[3] On 7 September 1983 the impounded ballots were opened and counted and the tally was 42 for and 29 against the Union, with 7 challenged ballots, a number insufficient to affect the results of the election. The Company filed timely objections to conduct affecting the results of the election,[4] alleging,

[1] The Regional Director had conducted an investigation of the objections, and a hearing also had been conducted on the appropriateness of the unit, the subject of one of the objections. The Respondent has failed to present evidence that the investigation was not properly conducted.

[2] In its response in opposition to the Motion for Summary Judgment, the Company also contends that the motion is premature because the Board has not yet ruled on its request for review of the Regional Director's supplemental decision in the underlying representation proceeding. A pending request for review stays neither a certification nor the resulting obligation to bargain and, therefore, does not affect the ripeness of a complaint alleging an unlawful refusal to bargain. See National Labor Relations Board Rules and Regulations, Sec. 102.67(b). In any event, as noted below, the Board by telegraphic order 2 March 1984 denied the Respondent's request for review prior to the Board's consideration of this case. We, accordingly, find no merit in the Company's contention. See *Hyatt Regency New Orleans*, 260 NLRB 534, 536 fn. 5 (1982), enfd. No. 82–8146 (11th Cir. June 21, 1983).

The Company in its answer also contends that the Motion for Summary Judgment should be denied because it fails to state a claim on which relief may be granted. We find no merit to this contention.

[3] Member Hunter dissented.

[4] On 20 September 1982 the Company also filed with the Board a motion for reconsideration of its 1 September 1983 order denying its re-

Continued

essentially, that the Union engaged in objectionable conduct by: (1) telling employees that the Company was attempting to illegally include nonunit employees among the eligible voters; (2) making improper promises to waive initiation fees; (3) making improper promises of health and welfare benefits and making material misrepresentations about those benefits; and (4) making other promises, threats, and misrepresentations, including misrepresentations about the Board's processes. The Company also repeated its contention that the unit is inappropriate.

After investigation, the Regional Director on 25 October 1983 issued a Supplemental Decision and Certification of Representative in which he overruled the Company's objections in their entirety and certified the Union as the exclusive bargaining representative of the employees in the unit found appropriate. On 16 November 1983 the Company filed a timely request for review of the Regional Director's supplemental decision, reiterating its objections and requesting that these objections be sustained. It also requested a hearing or independent investigation. By telegraphic order of 2 March 1984, the Board denied the Company's request for review,[5] thereby finding in effect not only that the Company's objections did not warrant overturning the election, but also that those objections did not raise substantial material issues warranting a hearing.

It is well settled that in the absence of newly discovered and previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues that were or could have been litigated in a prior representation proceeding. See *Pittsburgh Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941); Secs. 102.67(f) and 102.69(c) of the Board's Rules and Regulations.

All issues raised by the Company were or could have been litigated in the prior representation proceeding. The Company does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Company has not raised any issue that is properly litigable in this unfair labor practice proceeding. Accordingly we grant the Motion for Summary Judgment.

quest for review of the Decision and Direction of Election. On 23 September 1983 the Deputy Executive Secretary of the Board found the motion for reconsideration untimely and denied it on that basis.

[5] In conformity with his earlier vote on unit scope, Member Hunter dissented.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a California corporation, is engaged in the retail operation of a public amusement/entertainment facility in Santa Cruz, California, where during the past 12 months in the course and conduct of its business it derived gross revenues in excess of $500,000 and purchased and received goods or services valued in excess of $5,000 which originated outside the State of California. We find that the Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held 28 August 1983 the Union was certified 25 October 1983 as the collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time employees employed by the Company at its Wellington's Restaurant and Cocoanut Grove facilities, including facility services workers; excluding cashiers, musicians, entertainers, restroom matrons, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

Since 1 November 1983 the Union has requested the Company to bargain, and since 9 November 1983 the Company has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after 9 November 1983 to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Santa Cruz Seaside Company, Inc. d/b/a Cocoanut Grove and Wellington's Restaurant, Santa Cruz, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Hotel Employees and Restaurant Employees International Union, Local No. 483, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time employees employed by the Company at its Wellington's Restaurant and Cocoanut Grove facilities, including facility services workers; excluding cashiers, musicians, entertainers, restroom matrons, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Post at its facility in Santa Cruz, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Hotel Employees and Restaurant Employees International Union, Local No. 483, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time employees employed by us at our Wellington's Restaurant and Cocoanut Grove facilities, including facility services workers; excluding cashiers, musicians, entertainers, restroom matrons, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.

SANTA CRUZ SEASIDE COMPANY, INC. D/B/A COCOANUT GROVE AND WELLINGTON'S RESTAURANT